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SUBJECT: WIPO on Genetic Resources, Traditional Knowledge and  
Folklore

¶1. SUMMARY: Member States at the 14th session of the WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF), which was held in Geneva from June 29 to July 3, 2009, failed to reach an agreement on a recommendation to the 2009 WIPO General Assembly (GA) to renew the mandate of the IGC. The week-long, contentious deliberations were based on a proposal submitted by the African Group, which called for "text-based negotiations" in the period 2009/11, leading to the submission of a text of an "internationally legally binding instrument(s)" for the protection of GRTKF to the 2011 GA. The African Group proposal also set forth demands for convening six "intersessional working groups" in the next two-year period, which according to the WIPO Secretariat would nearly triple the proposed 2010/11 budget for the IGC. The United States, along with the European Union and the Group B nations, supported the renewal of the IGC mandate and offered a number of amendments to the African Group proposal. However, the negotiations collapsed late in the week when it became clear that the key elements of the African Group proposal were non-negotiable. The failure of IGC 14 follows a procedural impasse at IGC 13. As a result, the IGC has made no progress on its substantive agenda in 2009. Although some delegations (including the United States) expressed a willingness to continue the negotiations in informal consultations in the period leading up to the 2009 GA, in all likelihood the question of the renewal of the IGC's mandate will be left to the September 2009 WIPO General Assembly. End Summary.

#### The Gathering Storm: The African Group Proposal

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¶2. Under the chairmanship of Ambassador Rigoberto Gauto Vielman (Paraguay), the Committee agreed to change the order of the agenda for the session, moving up "Future Work" (agenda item 7) for early discussion, thus setting the stage for the week-long deliberations on the future of the IGC. The Committee also early agreed to use the proposal of the African Group on renewing the mandate of the IGC as the basis for the IGC's deliberations. Many countries in the Asian Group and GRULAC supported the proposal from the outset and were characterized as "partners." The African Group proposal (styled as "The Elements for the New Mandate") was tabled shortly before the meeting and consists of three core elements. First, the proposal calls for "text-based negotiations" on GRTKF during the next biennium. Second, the proposal calls for the submission of a text of an "internationally legally binding instrument/instruments" on GRTKF to the 2011 GA, with a request for convening a Diplomatic Conference in 2012. Third, the proposal calls for convening six "intersessional working groups" in the period 2010-2011, with a detailed work program and timetable set forth in an annex to the proposal. Taking into account the high sensitivity assigned by the African Group to ownership of its proposal, and in deference to the decision of the Chair, Group B and the EU initially refrained from introducing competing proposals as potentially counterproductive. Nor did any other delegation table an alternative proposal.

¶3. The African Group (supported by India and Brazil) expressed its strong preference to "negotiate" the text of its proposal in the plenary session, rather than in small working groups (the customary

WIPO practice). Again bowing to the demands of the African Group, the Chair decided on a process of compiling amendments to the African Group text in the plenary session. (Proposed amendments were projected onto a screen in the main WIPO hall.) The Chair's process for recording edits to the African Group proposal departed from well-established UN procedures. For example, instead of showing brackets or strikeouts to text that other delegations proposed to delete, the Chair decided to footnote the text, with a comment that a delegation proposed to delete the text. In addition, while some changes were shown by one or two word inserts, in many cases the Chair insisted on the submission of alternative paragraphs to show suggested revisions to the African Group's text. In the end, this unusual process resulted in a "text" that left the original African Group proposal completely intact while showing various (often overlapping) objections and alternatives.

#### Distant Thunder: Text-Based Negotiations

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14. The United States coordinated with the delegations of Japan, Canada, New Zealand, and Australia (the JUSCANZ group) in an effort to reach consensus on alternative language for key elements of the African Group proposal, which had mixed results. The United States, for example, proposed the deletion of the phrase "text-based negotiations," which would be replaced by "outcome-oriented deliberations, without prejudice to any outcome and on the basis of the Committee's prior work." As the U.S. delegation later explained, the substitute language was broad enough to allow the Committee to reach consensus on an international statement on the protection of GRTKF based on the Committee's prior work on "policy principles and objectives." The EU supported the U.S. proposal, while the Mexican delegation simply sought deletion of "text-based negotiations." Senegal and South Africa opposed the U.S. language, which they complained was unfamiliar in the UN context, and Brazil

criticized the U.S. amendment as "too non-committal."

15. The real enemy of consensus, however, may have been the apparent calculated vagueness of the phrase "text-based negotiations." In particular, a number of delegations privately expressed concern that the phrase "text-based" negotiations referred to the annexes to WIPO documents WIPO/TKGRF/IC/9/4 and 9/5, which contain certain "substantive provisions" organized into treaty-like format. Over the last seven sessions of the IGC, the United States and other developed countries have taken a firm position opposing the further development of these texts. In an effort to clarify this vague phrase, the delegation of New Zealand tabled its own proposal calling for the deletion of the phrase "text-based negotiations" and replacing it with "the development of text, without prejudice to any outcomes." New Zealand stated that it was not authorized to negotiate based upon specific IGC documents. Nonetheless, Senegal, on behalf of the African Group, while refusing to clarify the precise meaning of the phrase "text-based negotiations," rejected the New Zealand proposal. New Zealand later backed away from its proposed amendment, apparently persuaded that "text-based negotiations" referred to negotiations on the basis of all existing IGC texts.

16. In the view of a number of delegations, however, not all the IGC's work was sufficiently mature to warrant text-based negotiations, or even to justify the equal attention of the Committee. In particular, a number of members of the African Group and their partners (with Brazil leading the charge) expressed the view that the Committee's work on GR, which they characterized as not as far along as its consideration of TK and folklore, could proceed at a slower pace or be handled in a different way. Driving the point home, the delegation of Brazil (supported by India and Mexico) proposed qualifying the phrase "text-based negotiations" with the phrase "taking into account the different levels of development of the texts." Noting the lack of symmetry in the IGC's substantive work to date, but flipping Brazil's point, the United States and the EU tabled language instructing the Committee to continue its work in all three substantive areas on an "equal" (later revised to "impartial" (EU) or "non-discriminatory" (US)) basis.

#### The Lightning Bolt: Internationally Legally Binding Instrument

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17. The centerpiece of the African Group proposal was a demand to

submit to the 2011 WIPO GA a text for an "internationally legally binding instrument/instruments" on GRTKF, along with a recommendation of a date for the Diplomatic Conference. The demand to start negotiating a legally binding instrument drew high praise from the delegations of Brazil, Egypt, India, South Africa, Indonesia, Iran, Pakistan, and many Caribbean nations. However, the United States, the EU (with France playing a leadership role), and other Group B members (including those who were willing to accept most other African Group proposals) were not persuaded that the case had been made for the negotiation of a legally binding instrument. As an alternative, the United States proposed that the IGC submit to the 2011 GA "recommendations on the content for an outcome or outcomes, including the nature, format and status and how the Committee should finalize its recommendations" on GRTKF, while the EU suggested that the IGC's work program "should lead to an internationally legally binding or non-legally binding instrument/s on GRTKF." Neither the U.S. nor EU proposals were acceptable to the African Group.

#### Leaving the Ground Behind: The Ballooning IGC Budget

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18. Closely related to the African Group's demand for text-based negotiations leading to an internationally legally binding instrument was the request for "a defined work program and timeframe," including convening six "intersessional working groups" in the period 2010-2011. Group B countries and the EU, along with the United States, Mexico, and Switzerland, expressed their serious concerns regarding the financial and administrative implications of this aspect of the African Group proposal, especially during a period of constrained organizational resources. A number of delegations and NGOs also expressed concerns about the exclusive nature of intersessional work. The United States, Mexico and Switzerland requested additional budget information from the Secretariat to evaluate the proposal. Based on the information provided, the estimated IGC budget in the next two-year period would balloon to 2 million Swiss Francs, nearly tripling the proposed 2010/11 budget for the IGC and far in excess of the budgets of other WIPO committees. In part to conserve resources, but also to align the IGC work program with other WIPO committees, the United States proposed the deletion of the phrase "intersessional work" (to be replaced by the phrase "extraordinary sessions of the IGC in a format to be agreed"). The EU also opposed intersessional work for budgetary and policy reasons, but (as an apparent compromise) proposed two additional meetings of the IGC during the next biennium. The EU proposal did not attract support from other

delegations.

#### The Rainstorm: Getting Soaked on Process

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19. In a surprising mid-week ruling, rather than continuing the negotiations in the plenary session, Chairman Gauto invited the African Group to revise its own proposal, taking into account the amendments and comments of other groups and delegations. Quickly reversing their position on the value of the openness and transparency of deliberations in plenary sessions, the African Group accepted the Chair's invitation. The African Group promised to set aside the next morning for consultations with its "partners" but remained non-committal on whether they would deliver a "new proposal" to the plenary session. Looking for the silver lining in this dark cloud, the U.S. delegation renewed its earlier request for a meeting with the African Group, which was delayed until shortly before the plenary session on Thursday afternoon. At the request of the African Group, Australia, New Zealand and Canada joined the meeting. In casual disregard of the week-long effort to coordinate positions within the JUSCANZ group, and to the disappointment of the United States, the delegations of Australia, New Zealand and Canada used the meeting to advance their narrower national positions.

110. When the plenary session reconvened on Thursday afternoon, it became clear that the African Group consulted primarily with like-minded delegations (Brazil, Egypt, India, South Africa, Indonesia, Iran, Pakistan, many Caribbean nations) and had not attempted to work out compromise text with other delegations. With strong support from Pakistan, India, Brazil and the Philippines, the African Group insisted on retaining the key elements of its original proposal, characterizing the amendments offered by other delegations as violations of the spirit of and unhelpful efforts to dilute the

original African Group proposal, or entirely new proposals. More broadly, Brazil and India argued that it was unfair to protect holders of patents, copyrights and trademarks but to deny similar protection to indigenous and traditional holders of GRTKF. On behalf of Group B, the delegation of Germany repeatedly called on the African Group to provide IGC members with information on the consultation process and to explain how it discharged the Chair's mandate to accommodate the plenary amendments to the African Group proposal. The questions drew evasive and hostile responses from the delegate from Senegal and other African Group representatives.

¶11. On the last day of the plenary session, the EU tabled its own two-track proposal, calling for the renewal of the IGC mandate coupled with a recommendation for a GA resolution on the protection of GRTKF. The African Group rejected the concept of a two-track process as unworkable. Drawing on well-established national positions expressed throughout the meeting, both Australia (with the support of New Zealand) and Canada made proposals during the final-day plenary sessions. Although the African Group was dissatisfied with the new proposals, some members of the group thanked Australia and New Zealand for their efforts to find compromise language. According to some African Group members, the new proposals were not only unwelcome but also procedurally defective and thus inappropriate to be forwarded to the GA for further consideration. In particular, the delegate from Egypt argued that the last-day proposals were defective under the IGC's rules of procedure because they were not submitted in writing and translated in advance of the session. It followed, according to Egypt, that only the African Group proposal (which also failed to comply with certain IGC notice requirements) remained standing at the end of the week. The Legal Advisor, however, respectfully disagreed, advising the Committee that the African Group proposal, the amendments thereto, and the free-standing proposals tabled at the 14th session were all properly before the IGC. The Legal Advisor also stated that the mandate of the IGC continued through the end of 2009, correcting the misunderstanding of the delegate from Egypt that the mandate expired in September 2009.

#### Searching for the Rainbow

¶12. Despite persistent rumors that the African Group would call for a vote on its proposal for renewal of the IGC mandate, no delegation called for such a vote. Absent adoption of any proposal for the renewal of the IGC mandate (either by consensus or vote), it was agreed that the report of the committee on future work would simply state that IGC members "did not reach agreement on this agenda item." A consensus also seemed to emerge that all proposals on future work—the African Group proposal, the amendments thereto, and the other proposals—would be discussed and/or appended to a factual committee report of the 14th session, which would be available for further discussion and action at the September 2009 WIPO GA. However, the precise mechanism to reach consensus on the future of the IGC at the GA, which typically responds to recommendations from WIPO committees, remained unclear at the end of the 14th session. A number of delegations, including the United States, expressed a willingness to continue the negotiations in informal consultations in the period leading up to the 2009 GA, but the way forward

remained uncertain. Almost all delegations expressed regret at the failure of the IGC to reach agreement on a recommendation to the GA on the future of the Committee. What Brazil trumpeted as a "breakthrough" session of the IGC earlier in the week, turned into the IGC's "breakdown" session by week's end. Like an intense, summer rainstorm in Geneva, the 14th session of the IGC left the participants soaked, somewhat chilled by the experience, and still searching for a rainbow at the end of the storm.

¶13. The United States delegation consisted of Michael Shapiro (USPTO), Debbie Lashley-Johnson (State), Karin Ferriter (USPTO), Sezaneh Seymour (State), Peggy Bulger (LOC), and Michele Woods (LOC).